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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 413

GREENBELT COOPERATIVE PUBLISHING ASSOCIATION, INC., and ALFRED M. SKOLNIK,

Petitioners

v.

CHARLES S. BRESLER,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

Bresler again acknowledges that he is a public figure in Greenbelt. He seeks to avoid the constitutional effect of that status, however, by suggesting, for the first time here, that it was publicity given him in the News Review that made him a public figure (p. 3). This argument ignores not only the wide publicity previously given his activities in Greenbelt by The Washington Post (E. 242-4), but also, more importantly, the fact that Bresler clearly made himself a public figure in Greenbelt by his repeated and often controversial requests for support from the city council

and other public bodies for his major land development plans. As shown in the petition (p. 4, ftn. 1), these activities of Bresler clearly bring him within the criteria with respect to public figures set forth in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 146, 162 (1967).

The equal importance of protecting uninhibited debate with respect to public issues involving "public figures" as well as "public officials" was underscored by Chief Justice Warren in *Butts* as follows:

> Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct. 388 U.S. at 164

The citizenry of Greenbelt clearly had a "legitimate and substantial interest" in Bresler's pivotal involvement in the public issue raised by his controversial zoning proposal to the city council which directly affected how a substantial portion of their community was to be developed. Moreover, they were entitled to a full report of the debate on that proposal including the fact that many interested persons at the city council meetings expressed strong opinions that the proposal was an attempt to "blackmail" the city. These strong expressions not only directly related to the proposal, but their inclusion in the report was necessary to accurately convey the tone and tenor of the debate.

Thus, it is clear that the articles in issue are within the constitutional protection of the *New York Times* rule as extended in *Butts* to suits brought by public figures.[1]

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[1] Bresler's claims (pp. 3-4) that petitioners failed to raise a separate public figure defense or to request a proper instruction thereon are

II

Bresler attempts to gloss over the fact that seven out of eight instructions "omitted the magical words 'that is' after the word 'malice'" (p. 15). As clearly shown in its colloquy with counsel (Petition, p. 12), however, the trial court intentionally omitted these "magical words" in order to convey to the jury its view of the law that actual malice, as he had previously defined it to mean "ill will," was separate and distinct from knowing falsity or reckless disregard of the truth. The cumulative impact of these and the other clearly erroneous instructions on actual malice was hardly cured by the isolated, perfunctory and confusing instruction which the court finally gave on the *New York Times* rule.

III

Bresler's last argument demonstrates the wisdom of excluding the general concept of "ill will" from the definition of actual malice under the *New York Times* rule. Bresler's argument is that the News Review should be punished for the articles in which the word "blackmail" appeared because *eight months* later it published two articles which publicized a fund drive in the community, the proceeds from which were used to support a citizens' suit challenging his disregard of land covenants which he gave to the City in connection with another matter (p. 13).[2]

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equally without merit. Petitioners' constitutional defense clearly referred to Bresler's status both as a public official and as "an active participant in matters of pressing public concern to which the publications concerned were directed." (E. 6) On the basis of this defense, petitioners requested instructions that the articles were actionable only upon a showing of knowing falsity or recklessness under the *New York Times* standard. (E. 8-9) After these requests were rejected, petitioners repeatedly attempted to get a correct statement of the public figure aspect of the constitutional protection. (E. 206, 208)

[2]Bresler's statement that the News Review falsely represented that the funds were to be used for a suit in equity for an injunction when

Bresler's reliance in this regard upon Justice Harlan's opinion in *Butts* (p. 14) is completely misplaced. Justice Harlan argued for a constitutional standard that would permit a public figure to recover damages for a defamatory falsehood upon a showing of "highly unreasonable conduct constituting an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155. This test, like the *New York Times* test adopted by the majority, was intended to be applied to the defendant's conduct in publishing the articles claimed to be libelous. It clearly was not intended to permit recovery premised on a general finding of "ill will" based on such far removed and unrelated conduct of the defendant.

Bresler cannot argue that the articles in issue represent an "extreme departure" from responsible reporting standards. For, as shown in Appendix C to the petition, leading newspapers throughout the country do not hesitate to report the use of, or to use themselves, strong terms like "blackmail" in a noncriminal colloquial sense to criticize exertions of pressure in connection with public issues. Such is the essence of spirited public debate. Where, as here, such expressions of opinion are accompanied by a clear and accurate statement of the conduct being criticized, they are fully entitled to constitutional protection.

Thus, it is immaterial for purposes of this case which standard of constitutional protection is applied—that argued

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in fact they were used to finance a suit in law (p. 13) fails to point out that the articles appeared well *before* the suit was filed and that there was no evidence that any one on the News Review knew of the nature of the suit before it was filed (E. 67, 68-9, 230). This is only one of a number of irrelevant and misleading statements in his brief which seek to divert attention from the complete absence of any rational basis for the lower court's central finding that the articles in issue charge Bresler with the crime of blackmail.

for by Justice Harlan or the *New York Times* rule adopted by the majority in *Butts*. Both command a reversal.

Respectfully submitted,

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